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*Attorneys for Defendant Merck & Co., Inc.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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	:	
THE PEOPLE OF THE STATE OF NEW	:	<b>Civ. No.: 07 Civ 8434(GBD)</b>
YORK, by ANDREW M. CUOMO, Attorney	:	
General of the State of New York, and THE	:	
CITY OF NEW YORK,	:	<b>DECLARATION OF VILIA B. HAYES</b>
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
MERCK & CO., INC.,	:	
	:	
Defendant.	:	
-----	x	

VILIA B. HAYES declares as follows:

1. I am an attorney admitted to practice before this Court and a member with the firm of Hughes Hubbard & Reed LLP, attorneys for defendant Merck & Co., Inc. ("Merck"). As such, I am fully familiar with the facts set forth herein. I make this declaration based on my own personal knowledge and the business records of the Firm.

2. I make this declaration in support of the Reply Memorandum of Law in Further Support of Motion by Defendant Merck & Co., Inc. to Stay All Proceedings Pending Transfer Decision by the Judicial Panel on Multidistrict Litigation.

3. Attached hereto as Exhibit A is a true and correct copy of the letter from the JPML to the Hon. Ricardo H. Hinojosa, dated March 21, 2005.

4. Attached hereto as Exhibit B is a true and correct copy of the transcript of the Status Conference before the Honorable Eldon E. Fallon on June 23, 2005.

5. Attached hereto as Exhibit C is a true and correct copy of the slip opinion issued in *State of Montana v. Merck & Co., Inc.*, No. CV-06-07-H-DWM (D. Mont. May 11, 2006).

6. Attached hereto as Exhibit D is a true and correct copy of the slip opinion issued in *State of Alaska v. Merck & Co., Inc.*, No. 3:06-cv-0018-TMB (D. Alaska Mar. 6, 2006).

7. Attached hereto as Exhibit E is a true and correct copy of the Memorandum and Order issued in *Aguilar v. Merck & Co., Inc.*, No. 05-CV-4865 (SJ) (E.D.N.Y. Nov. 22, 2005).

8. Attached hereto as Exhibit F is a true and correct copy of the slip opinion issued in *Campbell v. Merck & Co., Inc.*, No. 05-CV-6740L, and related cases (W.D.N.Y. Mar. 1, 2006).

9. Attached hereto as Exhibit G are true and correct copies of the Complaints in *Foti, ex rel. State of Louisiana*, No. 05-3700 (E.D. La. May 5, 2006), *Hood, ex rel. State of Mississippi*, No. G2005-1742 (1st Jud. Dist. Ch. Ct. Miss. Oct. 4, 2005), *State of Alaska*, No. 3AN-05-14292 CI (3d Jud. Dist. Ct. Alaska Dec. 29, 2005), *McGrath, ex rel. State of Montana*, No. ADV.2005.899 (1st Jud. Dist. Ct. Mont. Dec. 28, 2005), *State of Utah*, No. 060907140 (Kouris) (3d Jud. Dist. Ct. Utah Apr. 28, 2006).

10. Attached hereto as Exhibit H is a true and correct copy of the slip opinion issued in *Holmes v. Merck & Co., Inc.*, No. 4:05CV00439 ERW (E.D.Mo. May 3, 2005).

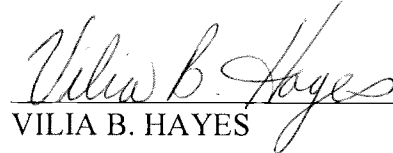
11. Attached hereto as Exhibit I are true and correct copies of Remand Orders issued in *Tallas, et al. v. Merck & Co., Inc., et al.*, dated September 5, 2006, and *Garza, et. al. v. Evans, et. al.*, dated November 22, 2005.

12. Attached hereto as Exhibit J is a true and correct copy of Order setting briefing schedule, issued in *Flippin, et al. v. Merck & Co., Inc., et al.*, dated August 8, 2007.

13. Attached hereto as Exhibit K is a true and correct copy of the transcript of the Status Conference before the Honorable Eldon E. Fallon on August 25, 2005.

14. Attached hereto as Exhibit L is a true and correct copy of the transcript of the Status Conference before the Honorable Eldon E. Fallon on October 27, 2005.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

  
VILIA B. HAYES

Executed this  
26<sup>th</sup> day of October, 2007

# Exhibit A

UNITED STATES OF AMERICA  
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

CHAIRMAN:  
Judge Wm. Terrell Hodges  
United States District Court  
Middle District of Florida

MEMBERS:  
Judge John F. Kaenan  
United States District Court  
Southern District of New York

Judge D. Lowell Jensen  
United States District Court  
Northern District of California

Judge J. Frederick Motz  
United States District Court  
District of Maryland

Judge Robert L. Miller, Jr.  
United States District Court  
Northern District of Indiana

Judge Kathryn H. Vratil  
United States District Court  
District of Kansas

Judge David R. Hanson  
United States Court of Appeals  
Eighth Circuit

Robert A. Cahn  
Executive Attorney

DIRECT REPLY TO:

Michael J. Beck  
Clerk of the Panel  
One Columbus Circle, NE  
Thurgood Marshall Federal  
Judiciary Building  
Room G-155, North Lobby  
Washington, D.C. 20002

Telephone: (202) 502-2800  
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<http://www.jpml.uscourts.gov>

March 21, 2005

Honorable Ricardo H. Hinojosa  
U.S. District Judge  
1701 W Bus Highway 83  
Bentsen Tower, Suite 1028  
McAllen, TX 78501

Re: MDL-1657--In re Vioxx Products Liability Litigation

*Felicia Garza, et al v Merck & Co, Inc., et al*, S.D. Texas, C.A. No. 7:05-17

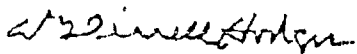
Dear Judge Hinojosa:

Presently before the Panel pursuant to 28 U.S.C. § 1407 is a notice of opposition to the Panel's conditional transfer order in the above matter pending before you. The parties will have an opportunity to fully brief the question of transfer and the matter will be considered at a bimonthly Panel hearing session. In the meantime, your jurisdiction continues until any transfer ruling becomes effective.

If you have a motion pending -- such as a motion to remand to state court (if the action was removed to your court) -- you are free to rule on the motion, of course, or wait until the Panel has decided the transfer issue. The latter course may be especially appropriate if the motion raises questions likely to arise in other actions in the transferee court and, in the interest of uniformity, might best be decided there if the Panel orders centralization.

- Please feel free to contact our staff in Washington with any questions.

Kindest regards,



Wm. Terrell Hodges  
Chairman

## Exhibit B

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF LOUISIANA  
3 NEW ORLEANS, LOUISIANA  
4

5 IN RE: VIOXX PRODUCTS  
6 LIABILITY LITIGATION

\* Docket MDL 1657-L  
\*  
\* June 23, 2005  
\*  
\* 9:30 a.m.

8 \* \* \* \* \*

9  
10 STATUS CONFERENCE BEFORE THE  
11 HONORABLE ELDON E. FALLON  
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 For the Plaintiffs:

Seeger Weiss  
BY: CHRISTOPHER A. SEEGER, ESQ.  
One William Street  
New York, New York 10004

17 For the Defendants:

Stone Pigman Walther Wittmann  
BY: PHILLIP A. WITTMANN, ESQ.  
546 Carondelet Street  
New Orleans, Louisiana 70130

20 Official Court Reporter:

Toni Doyle Tusa, CCR  
500 Poydras Street, Room B-406  
New Orleans, Louisiana 70130  
(504) 589-7778

23  
24 Proceedings recorded by mechanical stenography, transcript  
25 produced by computer.

PROCEEDINGS

(June 23, 2005)

THE DEPUTY CLERK: Everyone rise.

THE COURT: Be seated, please. Good morning, Ladies and Gentlemen. Call the case, please.

THE DEPUTY CLERK: MDL 1657, In Re: Vioxx.

THE COURT: Counsel, make your appearances for the record.

MR. SEEGER: Good morning, Your Honor. Chris Seeger for the plaintiffs. I'm going to be playing Russ Herman today.

MR. WITTMANN: Phil Wittmann, Your Honor, liaison counsel for the defendants.

THE COURT: I understand we have some counsel on the phone. Who is that?

MS. SOTOODEH: Pamela Sotoodeh in Chicago.

MS. KOPELMAN: Richard Kopelman of Decatur, Georgia.

THE COURT: Good morning. This is our monthly status conference. I have received from the liaison counsel the proposed agenda. We will take the items in order. The first is LexisNexis File & Serve. Let me have a report on that.

MR. SEEGER: Judge, we continue to have problems with LexisNexis. We are having problems getting documents posted and served. On the other end, they're having problems identifying firms that are already previously registered. We have got some calls set up with them to try to work through



1 some of these issues. We are hoping to be able to do that.

2 THE COURT: Let's get them in person in the court.  
3 Let's do it next week. I will get my staff to give you a day.  
4 I would like to see LexisNexis here, the president of the  
5 company, or somebody who can talk with me about any problems.  
6 I would like you all present to get this resolved. We need to  
7 go on line as quickly as possible. We don't have time to have  
8 to rely on surface mail. There are too many people in this  
9 case. It really needs to be worked out.

10 I'm a little disappointed because LexisNexis  
11 just took this over. I've had some experience with the people  
12 from whom they bought this company and we didn't have any  
13 problems with the prior group. I don't know why LexisNexis --  
14 a bigger outfit, more resources -- is having problems when the  
15 earlier group did not, so maybe they can help me understand  
16 that.

17 MR. SEEGER: We will make arrangements to bring them  
18 in.

19 THE COURT: Thank you.

20 MR. WITTMANN: Yes, Your Honor. We have not had  
21 problems with LexisNexis. It seems, from the defendants'  
22 standpoint, to be working okay. The few issues that have come  
23 up, we have dealt directly with their representatives and they  
24 have been responsive to our requests, so we are satisfied.  
25 It's going okay from our standpoint.

1           If the Court please, we might give the folks a  
2     statistical background on what's happening in the MDL at this  
3     point. As of June 15, we had 907 cases in the MDL. Although  
4     some of those cases have not yet been served on Merck, they are  
5     here, 907 of them. There are over 700 Vioxx products liability  
6     cases served and pending in federal court but not yet here.  
7     There are over 170 cases served and pending in state courts  
8     other than New Jersey and California. There are over 1,900  
9     cases served and pending in the New Jersey consolidated  
10    proceeding. There are approximately 180 cases pending in the  
11    California state court, and those cases involve approximately  
12    1,000 plaintiffs. That's our statistical update.

13           THE COURT: What about the numbers of class actions?

14           MR. WITTMANN: Class actions I believe are 118.  
15    That's up about eight from our last status conference. We  
16    either have provided or will provide copies of the additional  
17    class action complaints to plaintiffs' counsel. Their deadline  
18    for filing the master complaint, incidentally, is August 1.

19           THE COURT: Trial settings.

20           MR. WITTMANN: Yes, Your Honor. The first case that  
21    we know that's set for trial is the Ernst case in Brazoria  
22    County, Texas, on July 11, 2005. We have a case in New Jersey,  
23    the Humeston case, which is set on September 12, 2005. The  
24    Guerra case is set for trial in Hidalgo County, Texas, on  
25    September 19, 2005. The Zajicek case is set for trial in

1 Jackson County, Texas, on September 26, 2005, but we are told  
2 that's likely to be continued over to the first quarter of  
3 2006. The Tomlin case is set for trial in Florida in St. Lucie  
4 County sometime between October 3 and December 30, 2005. That  
5 exact date has not been fixed yet. In addition to that, we  
6 have a hearing set in the Engineers case in New Jersey on  
7 June 30 to determine whether the court will certify a  
8 nationwide case of third-party payors.

9 THE COURT: One of the challenges, from the  
10 standpoint of the MDL, is to deal with cases not only  
11 throughout the country in the federal system, but also cases  
12 that are in the state system. One benefit of the MDL is  
13 consistency and uniformity. The significance of uniformity and  
14 consistency in the large numbers of cases is to allow you  
15 folks, who are the lawyers in the cases, to be able to get a  
16 read on matters so that hopefully you can evaluate the cases  
17 and see whether or not there's any shorter way of dealing with  
18 it, namely settlements or dealing with it in some motion way or  
19 other evidence. Consistency or at least predictability is one  
20 of the benefits of trials.

21 My concern oftentimes, if there are trials in  
22 various jurisdictions, is that it doesn't afford the same  
23 consistency if you had it in one jurisdiction, wherever it is.  
24 It just gives you some more consistency and, therefore, more  
25 predictability, and you're able to then learn from that

1 particular trial.

2 My hope was that we could begin trying cases in  
3 the MDL as quickly as we can so that you can have that read and  
4 benefit, but I do recognize that cases have been in state court  
5 for about four years now. It's hard to have a litigant wait,  
6 after they have done all the work in a particular case, and  
7 then have to delay unduly. I have to measure both of those  
8 things and weigh both of those things. I've been getting a lot  
9 of good cooperation from the various state courts, and I think  
10 that many of them feel the same way as I do. We will do the  
11 best we can with it. In that regard, let me segue into the  
12 next item, which is the selection of cases for an early trial  
13 date in this particular proceeding.

14 MR. SEEGER: Judge, if you don't mind, on the last  
15 point, just for the benefit of the lawyers reading the  
16 transcript, we have requested of the defendant that going  
17 forward, when they list the trial cases, that they give us the  
18 name of the case, the court it's in, the attorney of record,  
19 and if they can tell us what the injury is. I think that will  
20 assist us in coordinating with those lawyers and help our state  
21 federal liaison committee, as well.

22 THE COURT: Fine. We have got to watch from both  
23 sides that cases are not tried before it's appropriate to try  
24 them because that's going to skew the situation. It's not  
25 going to help anybody to try a case that is either not

1 representative or that's not ready to be tried. It's going to  
2 hurt the rest of your cases. Let's be conscious of that.

3 MR. WITTMANN: I think, in response to Chris' point,  
4 we have been talking about Ernst and Humeston for a long time  
5 now. I thought I had given that information to Russ, but we  
6 will make sure he has it from now on.

7 THE COURT: Talk to me about trial dates for the  
8 cases here.

9 MR. WITTMANN: Trial dates here, Judge, Mr. Herman  
10 and I have been meeting and working on it ourselves. More  
11 recently than that, Mr. Marvin has been meeting with Mr. Seeger  
12 and others on the plaintiffs' steering committee to try and get  
13 a pool of cases from which we can select cases for trial here  
14 in the Eastern District. I would like to let Mr. Marvin  
15 address that since he has been more familiar with the recent  
16 negotiations than I have.

17 THE COURT: Okay.

18 MR. MARVIN: Good morning, Your Honor. Your Honor,  
19 we have identified two pools of cases that could yield cases  
20 for early trials. The first pool could come from the Eastern  
21 District of Louisiana, where there are approximately 40 cases  
22 presently on file. What we would need to do for those cases is  
23 to have a short schedule for submission of the plaintiff fact  
24 sheets so that both plaintiffs and defendants could look at  
25 those cases and make some selections from those cases.

1           A second pool of cases, though, could come from  
2 cases that have already been filed in the federal court and,  
3 indeed, were filed even before the establishment of this MDL.  
4 Discovery in a number of those cases has proceeded, and some to  
5 an advanced stage. There are approximately 40 cases, for  
6 example, where requests for interrogatories have been made,  
7 answers have been given, plaintiff fact sheets have been  
8 submitted, and medical records collected. That's an important  
9 matter because collection of medical records could take several  
10 months. So we do have 40 cases where we think that, working  
11 with the plaintiffs, we can identify those cases. Those cases  
12 would have objective criteria for the selection of those cases  
13 because of the advanced discovery and, indeed, we would be  
14 prepared to send our list of cases that we think would fit that  
15 criteria within the next five days.

16           THE COURT: Let's do that in five days, then let me  
17 hear from the plaintiffs in five days, and then we will meet  
18 and pick the cases. The Eastern District cases I can try here.  
19 The other cases that are put in from other states, even in the  
20 federal system, in view of the Lexicon case I may have  
21 difficulty trying them unless there's some stipulations. I can  
22 do it in one of two ways. I can either try them with the  
23 stipulations here or I can go to the area that the case  
24 emanates from. An MDL judge sits throughout the country and is  
25 able to do that. I can go to the other area.

1           The thing that you both have to look at is the  
2 Circuit that you are dealing with because if I try them here,  
3 even with stipulations, my understanding is the Fifth Circuit  
4 will take the case from me in the appeal. If I try them in  
5 another area, the circuit in that area will try it. I don't  
6 know whether it's good or bad or whether people have feelings  
7 one way or the other, but at least that's something for both  
8 sides to consider when we talk about those cases.

9           MR. MARVIN: Fair enough.

10          THE COURT: Also, logistics, if I'm going to go some  
11 other place, that area needs to know I'm going to be there, the  
12 court space and the Marshals Service and things of that nature.

13          MR. MARVIN: Thank you, Your Honor. Once that list  
14 is completed, we will continue working with the PLC to review  
15 that list and hopefully come up with some cases.

16          THE COURT: After five days, if the plaintiffs can  
17 get to me, I'll set a meeting. I will see both of you and pick  
18 the cases.

19          MR. SEEGER: Judge, just a couple of brief comments  
20 on this. We are all for getting a case scheduled for trial as  
21 soon as possible. We like the November/December timeframe.  
22 I'm not one of those lawyers and I don't think the attorneys on  
23 the PSC are lawyers that believe we have to turn over every  
24 document and every stone before we start trying a case.  
25 However, I do want to make the Court aware of the fact that we



1 are trying to get discovery from the FDA and some third parties  
2 and some remaining discovery from Merck that we would like to  
3 get.

4 THE COURT: The early cases, if we are going to push  
5 then as quickly as we can to make them meaningful, it's not  
6 just to try the cases. It's to give both of you some idea of  
7 how a jury feels about that particular case. First, I need  
8 cases that are ready for trial. It's not going to do you any  
9 good to try a case that's not ready for trial because whatever  
10 the verdict is, somebody is going to have an excuse for it and  
11 say, "Well, but for it being ready, it would have been  
12 different," that sort of thing, whatever it is.

13 Secondly, I would like you to give some thought  
14 to grouping them. If we are dealing with death cases, I don't  
15 want to try all death cases because there are personal injury  
16 cases, so we ought to try some cases that will give you some  
17 benefit from the jury's view of that particular case. We need  
18 cases that are ready and we need some variety.

19 MR. SEEGER: Thank you, Judge. With your comments in  
20 mind, we will be talking with the defendants about potentially  
21 a pool. We will be proposing cases, as well. Thank you.

22 THE COURT: Thank you. Class actions is the next  
23 item on the agenda.

24 MR. WITTMANN: Yes, Your Honor. I have really  
25 covered that already. I think it's on track in accordance with



1 the Pretrial Order governing class actions, and the plaintiffs  
2 are due to file their master complaint or complaints by  
3 August 1.

4 THE COURT: Okay. The discovery directed to Merck.

5 MR. WITTMANN: Yes, Your Honor. There are a couple  
6 of facets to that. First of all, I don't think your Pretrial  
7 Order on the individual cases is generally available yet, but  
8 we have submitted an agreed Pretrial Order to you on the  
9 individual cases. I understand you have signed it, but it  
10 hasn't been posted yet.

11 THE COURT: I have signed it, yes.

12 MR. WITTMANN: There are two parts to that order.  
13 The first part deals with the actual procedure for filing  
14 motions and dealing with that process in the MDL. The second  
15 part, which we suggested be designated "Pretrial Order \_\_ A,"  
16 if you recall, dealt with the actual review of prior discovery  
17 produced by Merck in other cases. That process is ongoing.  
18 The protocol for doing that is established by that Pretrial  
19 Order and the parties are doing that now, even as we speak, up  
20 in New Jersey.

21 We don't have any problems with respect to the  
22 documents that have already been produced and the depositions  
23 that have been taken. Those are being made available to the  
24 plaintiffs' steering committee, and so far as I know that  
25 process is going on without any problem. We have some

1 significant disputes with respect to the additional discovery  
2 propounded by the plaintiffs' steering committee, both the  
3 interrogatories and the document requests. It's our belief  
4 they are overly broad. We have made that clear to the  
5 plaintiffs' liaison counsel and plaintiffs' steering committee.  
6 The parties have been working, trying to narrow those requests  
7 to take into account the extent of which those requests are  
8 duplicative of materials produced in other proceedings which  
9 are being made available up in New Jersey.

10 We have set, by agreement with the plaintiffs'  
11 steering committee, I think a deadline of July 5 by which to  
12 complete that meet-and-confer process to try and narrow down to  
13 see if we can agree on what additional materials will or will  
14 not be produced. If we are unsuccessful, then we will be in to  
15 see Your Honor, I think, within 10 days after that.

16 THE COURT: Let me just make a couple of comments on  
17 the discovery part. Discovery, particularly paper discovery,  
18 is supposed to be helpful and not just stumbling blocks. The  
19 purpose of discovery is to help you try your cases or get ready  
20 for trial. If you get so tied into discovery, it gets to be so  
21 voluminous and so time consuming and so burdensome that it saps  
22 not only your energy, but your resources and your thinking and  
23 sidetracks you, it is not good. It's got to be helpful. It  
24 can't be just, "Let's get it because it's there," "Let's not  
25 give it because we have got it." It's got to be helpful.

1           My thinking on discovery is that you all first  
2 meet and share with each other a draft of what you need and  
3 discuss it. If you can arrive at an agreement, that's fine.  
4 If you can't arrive at an agreement, then before it's in final  
5 form, talk to me about it. I'll tell you what my ruling will  
6 be so we don't have to go back and forth. The plaintiffs don't  
7 have to wait for 30 days to get a response, which is an  
8 objection, and then they have to wait for another 30. We don't  
9 have time to do that, so we have to streamline it. Get  
10 together and see what you agree on. I don't have to be brought  
11 into the agreement. The disagreements, bring me in and I will  
12 resolve the disagreements. We will do it as quickly as we can.

13           MR. WITTMANN: Your Honor, are you saying that during  
14 the course of our negotiations, if we do reach some impasse,  
15 that you would welcome a conference call?

16           THE COURT: Get it to me right there and I'll resolve  
17 the controversy.

18           MR. SEEGER: If Russ were here, he would have a great  
19 quote from William Shakespeare something to the effect, "I've  
20 never met a defendant that said a discovery request wasn't  
21 burdensome," but having said that --

22           THE COURT: I'm sure Shakespeare said something like  
23 that.

24           MR. SEEGER: In New York there's a guy named  
25 Shakespeare who said something along those lines. The truth is

1 we served discovery. Merck has asked for a little bit more  
2 time to continue discussing it. We are going to do that. We  
3 are anxiously awaiting their response. There are no real  
4 surprises in what we are asking for. As you said, Your Honor,  
5 the case is being litigated. It has been litigated for a  
6 while. I think we all know what we need.

7 THE COURT: Again, if you have already got some  
8 material, let's work out something that if you've got it they  
9 don't need to reproduce it. I know that sometimes you receive  
10 some material that's case specific and this is noncase  
11 specific, so you may need to go outside of that. If you have  
12 got it, let's get on to something else. The Pretrial Order  
13 governing individual cases.

14 MR. WITTMANN: Yes, Your Honor. You have those now.  
15 There are actually two Pretrial Orders. One relates to the  
16 production of documents in other cases, which is really a part  
17 of the Pretrial Order for the individual cases.

18 THE COURT: I have that. I signed it. It should be  
19 posted. Merck employee information is the next item. I have  
20 briefs on that. I've set next Wednesday at 2:00 to have a  
21 hearing on that oral argument on that question. The next item  
22 is discovery directed to the FDA. How are we with that? We  
23 had some misunderstandings. I got the FDA on the phone and  
24 everybody was able to talk about it. I had the opportunity to  
25 express my views. I haven't heard on it formally since then.

1 MR. SEEGER: Your Honor, my co-lead counsel,  
2 Andy Birchfield, met with the FDA, so he is going to address  
3 this issue.

4 MR. BIRCHFIELD: Your Honor, Russ Herman, Troy  
5 Rafferty, and I met with the FDA with their counsel and with  
6 the U.S. attorney Sharon Smith at the FDA headquarters in  
7 Rockville, Maryland. We discussed the items on the subpoena  
8 and we were able to reach agreement on a number of those  
9 issues. We have continuing dialogue on some of the others.  
10 The important thing was that we were able to at least get the  
11 discovery process, the review process, and the production  
12 process moving while we are continuing dialogue. They have  
13 agreed to provide us with the first page of the documents that  
14 were produced in Congress so we can review those and identify  
15 which ones we actually need. They have also agreed to start  
16 the production. We expect by the end of July to get the  
17 initial production. They will continue that on a rolling  
18 basis. We are making considerable progress on the FDA  
19 production.

20 THE COURT: I should express the Court's appreciation  
21 to the chair of the FDA. I appreciate his help. He should  
22 know that I am obliged to him for getting involved in this  
23 matter and helping us move forward. I do publicly appreciate  
24 his help.

25 MR. BIRCHFIELD: One other thing on that. Merck,

1 Ben Barnett, was also there. There is cooperation there. They  
2 are agreeing to provide a list of documents that are between  
3 the FDA and Merck so we can review that list and determine  
4 which ones need to be produced and which ones we already have.

5 THE COURT: Thank you very much. Discovery directed  
6 to third parties is the next item.

7 MR. SEEGER: Your Honor, we are in the next couple of  
8 days going to get out probably about a dozen or so subpoenas to  
9 third parties. We are going to try to stage it in a way so we  
10 do it in phases, but at this point there's not much to report  
11 other than we are going to get the subpoenas out.

12 THE COURT: Let's keep that on the agenda so that you  
13 can talk to me about it next time. We really ought to work  
14 through that. That's an important part. Deposition  
15 scheduling.

16 MR. WITTMANN: The first and third weeks of the  
17 month, Judge, were set by prior Pretrial Order. We had sent a  
18 request to the plaintiffs' steering committee last week asking  
19 that depositions be set in some of the Louisiana cases starting  
20 the first week in July or, alternatively, the third week in  
21 July, depending upon what they were able to pull together from  
22 their clients. We left the selection of the plaintiffs to be  
23 deposed to the plaintiffs' steering committee because we are  
24 trying to accommodate the individual plaintiffs and not just go  
25 out and arbitrarily pick dates and select them. Your Honor has

1 told us in our prior Pretrial Order that we are to cooperate in  
2 trying to arrange a mutually agreeable date before running out  
3 and setting depositions by notice.

4 We have not heard back. I understand from the  
5 plaintiffs' steering committee this morning that the cases that  
6 we have selected may not be suitable for the early trials in  
7 this Court, so we are waiting to get a list, really, of the  
8 cases that we think will go forward for an early trial and will  
9 set them for deposition as soon as we can.

10 THE COURT: Okay. Let's keep an eye on prioritizing.  
11 There's some issues that might cut across the spectrum. You  
12 may want to take depositions of individuals that have something  
13 to say about the general theories so they will be significant  
14 in each case, but with regard to case-specific discovery I  
15 think you should focus on the cases that we select for trial  
16 and do those. Now, that doesn't mean that you only have to  
17 have one wave of depositions. You can have a couple of tracks  
18 going on. You have to be able to do several tracks at the same  
19 time in a case like this.

20 MR. SEEGER: You just anticipated my comments. We  
21 think that the depositions of plaintiffs should somehow  
22 dovetail with what we are doing on trial schedules, although I  
23 would like to correct the record. I don't have any opinion on  
24 whether cases by any other lawyer are appropriate for trial or  
25 not. I think we have to come up with a criteria for selecting



1 cases that will inform decisions that may be made down the road  
2 between the parties.

3 THE COURT: The next item is the plaintiffs' profile  
4 form and Merck's profile form. I understand from the parties  
5 that with regard to the plaintiffs' profile form they have  
6 reached an agreement. On Merck's profile form, they have not  
7 reached an agreement. Each side submitted to me their  
8 disagreements and I have resolved the conflict. I'll be today  
9 putting out the defendants' profile form that will be used in  
10 this case. That will be resolved.

11 Also, with the profile forms of both sides, it  
12 seems to me that we ought to do that in waves. The first wave,  
13 I would like both the plaintiffs and the defendants to focus on  
14 and limit the forms to the cardiovascular events -- the  
15 myocardial infarctions, the ischemic strokes, the deaths -- and  
16 then shortly thereafter, when we get some experience with those  
17 forms and with filling them out and any problems, in resolving  
18 those problems we ought to be able to step it out quickly to  
19 the second wave, which may not require as detailed information.  
20 It seems to me to be the best way of doing it. I put some  
21 handwritten notes on this form and I will simply adopt it in an  
22 order and give you my thinking on that particular form. The  
23 plaintiffs will have to redraft the form and submit it.  
24 Medical records from healthcare providers is the next item.

25 MR. SEEGER: Judge, I think that we have agreed on a



1 procedure for having medical records posted online almost  
2 identical to what we are doing in New Jersey for plaintiffs'  
3 lawyers as well as defense counsel to have access to records in  
4 a secure way. I think that's been accomplished.

5 MR. WITTMANN: That's correct, Your Honor.

6 THE COURT: Contact with claimants' healthcare  
7 providers. That's the subject of another motion. I received  
8 briefs for reconsideration on that issue. I'll be hearing that  
9 in oral argument on Wednesday, also. The plaintiffs'  
10 depository is the next item on the agenda.

11 MR. SEEGER: We are happy to report we are up and  
12 running. We have got it staffed and it is available to  
13 plaintiffs' lawyers who want to come look at documents and  
14 contribute to the document review. We welcome the help.

15 THE COURT: Talk with the defendants. If they have  
16 no objection, I would like to at least look at the depository,  
17 if that's possible, just see that it's up and running and so  
18 forth.

19 MR. WITTMANN: That's no problem, Judge, whenever  
20 counsel wants to set it up.

21 THE COURT: Set it up and we'll take a look at it.  
22 The confidentiality agreement is the next one.

23 MR. WITTMANN: That's been signed. Your Honor, I  
24 haven't had any problems with it. We had one question as to  
25 whether some of the material that was attached to I believe the

1 brief filed by the state liaison committee may have contained  
2 some confidential information. I don't believe it really did,  
3 but the time hasn't yet run for us to designate. We are still  
4 looking at that. We may have some comment about it. I don't  
5 think it's a major problem.

6 THE COURT: That's an issue always of concern and  
7 it's a balancing issue. It's a balancing issue between the  
8 First and Sixth Amendments. The First Amendment, of course,  
9 the right of the public to know, it's vital in a democracy that  
10 the public know. It's also vital in a democracy that people  
11 have every right to a fair trial. There's some conflict  
12 occasionally between the First and the Sixth Amendment. The  
13 way that it's worked out, in my judgment, in a fair way is to  
14 not deprive the public of a right to know, but perhaps delay  
15 the public's information, unless it is a critical type of  
16 information which is necessary for immediate knowledge.

17 I'm focused, instead, on the right to a fair  
18 trial for both sides, and there is certain proprietary  
19 information in these documents that drug companies  
20 realistically and legitimately get concerned about releasing,  
21 proprietary information that could affect their present or  
22 future business practices. I am conscious of the public's  
23 right to know, but I am also conscious of the fact that if I  
24 don't have a confidentiality order, then it delays the  
25 discovery and delays trials and delays justice. I have dealt

1 with this issue in that fashion. We have a confidentiality  
2 agreement which will allow the defendants comfort to produce  
3 certain information without fear that their future economic  
4 security is in jeopardy. The remand issues.

5 MR. SEEGER: Judge, that's in the report. You are  
6 going to be dealing with remand motions as a group by  
7 procedures that you will be setting up.

8 THE COURT: Right. This is always an issue which the  
9 MDL Court has to look at. The question is posed. There are  
10 various issues of remand in various cases throughout the  
11 country. Again, a significant advantage of the MDL concept is  
12 some consistency. The Rule of Law is really based on  
13 consistency. If different decisions are made by numerous  
14 judges, then you have no consistency and no predictability and  
15 no one knows exactly what to do or how to do it. It's easier  
16 if one court decides some of these matters than if 50 or 100  
17 courts decide the matter.

18 I'm conscious of dealing with the remand as  
19 quickly as possible, but I do want to get them all together,  
20 look at them, see if I can group them in some way, and then  
21 direct my attention on each particular group and deal with that  
22 issue in a consistent and fair fashion for that group. I will  
23 be dealing with them as quickly as I can, but also with an idea  
24 of having more consistency. I'll be speaking about this  
25 perhaps later on because I do have some concepts and ideas

1 about this. Tolling agreements is the next item.

2 MR. SEEGER: Judge, just to report that we have  
3 accomplished our goal. It was a long negotiation, but we got  
4 it resolved. Both sides have compromised and agreed on a  
5 tolling agreement. It seems to be working. We are getting  
6 cases in.

7 MR. WITTMANN: The agreement was filed, I guess, on  
8 the 9<sup>th</sup> of this month, so it's just recently been filed, but  
9 we are starting to get people taking advantage of it. We are  
10 getting the short form exhibits mailed in. We have a procedure  
11 set up by the defendants to respond to those exhibits as they  
12 come in. We are keeping a record of them so we know exactly  
13 where we stand with respect to the people who have elected to  
14 go forward on the tolling agreements, Your Honor.

15 THE COURT: I appreciate the help on both sides on  
16 the tolling agreements. I think it's good for each side. I  
17 think there's different advantages, but advantages for each  
18 side, and I think it will be helpful to you. Certainly, I  
19 think it will be helpful to the litigants. The next item is  
20 state/federal coordination. State liaison committee, are there  
21 things that you want to say?

22 MS. BARRIOS: Yes, Your Honor. We have been fairly  
23 active since our last meeting here. At the Court's order, we  
24 were allowed to file a brief on the issue of the Merck employee  
25 information. We did that and I question, Your Honor, if you

1 would like us to be present at the hearing on Wednesday to make  
2 a presentation?

3 THE COURT: Sure. You are always welcome to  
4 participate in a hearing.

5 MS. BARRIOS: Thank you, Your Honor.

6 THE COURT: I'm interested in your views. I have  
7 looked at the brief. A lot of it has already been said. I  
8 don't think I need any response from the defendants on it. I  
9 think you have covered it in your particular response. Let's  
10 keep that in mind. I know that oftentimes you see matters in  
11 the same fashion as perhaps the plaintiffs' steering committee.

12 MS. BARRIOS: Yes, Your Honor.

13 THE COURT: If you do, just "Me, too" it. I don't  
14 need you to restate it. That's sufficient. If you see it in a  
15 different light, just carve that out. If I need some response,  
16 I will direct the defendants to give me a response on it.

17 MS. BARRIOS: Yes, sir. We have no intention of  
18 being duplicative. With the cooperation of Mr. Wittmann's  
19 office and Mr. Herman's office, we have received a roster of  
20 over 700 plaintiffs' attorneys names. We sent out our first  
21 very lengthy newsletter detailing the orders, the web site,  
22 etc. We have gotten extremely good feedback from different  
23 plaintiffs' attorneys across the country on it. We have had  
24 several conference calls with our committee. Mr. Witkin on our  
25 committee made a presentation at the Mealey's seminar about the

1 MDL yesterday. We met with the PSC last night and look forward  
2 to working with them to reserve the rights of the plaintiffs'  
3 attorneys and their clients.

4 THE COURT: I appreciate all of your interest and  
5 work and willingness to work on the committee. It's very  
6 important. I know there's some interests that are different.  
7 That's the way of the world. There's some joint interests and  
8 so rather than reinvent the wheel and do things a second time,  
9 third time, fourth time, it is helpful for you to be in the  
10 development of it so that you can just migrate that information  
11 into your proceedings so you don't have to redo it again.

12 MS. BARRIOS: Yes, Your Honor. Thank you.

13 MR. SEEGER: From the PSC's perspective, we have  
14 enjoyed the working relationship with the committee. We think  
15 the lawyers on the committee are of extremely high quality.  
16 They have been proactive in anticipating issues. We welcome  
17 their input on anything we do. We did have dinner last night,  
18 had a chance to talk through some important issues before we  
19 poured the first bottle of wine -- which was helpful -- and we  
20 are looking forward to the continued cooperation between our  
21 committee and theirs.

22 THE COURT: The waiver of service is the next item.

23 MR. WITTMANN: Yes, Your Honor. You have the  
24 Pretrial Order in effect on that. I think it's Pretrial  
25 Order 15, and we haven't had any problems.

1 THE COURT: The next item is direct filing into the  
2 MDL. Ms. Loretta Whyte was kind enough to meet with us earlier  
3 today to discuss that in more detail. The issue, of course, is  
4 whether or not the party who files directly into the MDL should  
5 have the MDL caption or should have their independent caption.  
6 Ms. Whyte tells us that the best way of doing it, from her  
7 vantage point, is to have an individual caption just as you  
8 would if you file a regular case, but put on that "Related  
9 Case, MDL" and give the number. She will then migrate it into  
10 the MDL proceedings. That will be the best way of doing that.  
11 Is that right, Ms. Whyte?

12 MS. WHYTE: Yes.

13 MR. SEEGER: There's one thing on that issue that's  
14 important to note for people reading the transcript. There's  
15 been some confusion whether the lawyers need to be admitted  
16 pro hac to file cases.

17 THE COURT: They do not need to be admitted pro hac.  
18 I have waived that. Anybody who's in the MDL or has a case in  
19 the MDL is able to handle a matter.

20 MR. SEEGER: Just to be clear, Ms. Whyte, the cases  
21 that get filed must mention the Vioxx MDL and that it's a  
22 related case?

23 MS. WHYTE: It's a related case.

24 THE COURT: Anything further on that? Pro se  
25 claimants.



1 MR. SEEGER: Well, Your Honor, we have been referring  
2 what we have been getting from the Court to our plaintiffs'  
3 liaison counsel and these are being dealt with.

4 THE COURT: I think we have a system of doing it. So  
5 far most of the pro se claimants have been individuals who have  
6 not been able to be personally present at these meetings. They  
7 are generally incarcerated some other place and can't make it  
8 here, so they need a lawyer. They have expressed their  
9 interest in being represented, so I have given that to liaison  
10 counsel. I understand that what they do is contact lawyers in  
11 the state of that particular institution and make those lawyers  
12 available to them, or at least tell them that they would be  
13 available. That seems to be working.

14 Anything further from anyone that I haven't  
15 covered before I set the next status conference date? Anything  
16 either from the state committee, liaison committee, or anyone  
17 in the audience? I'm interested in hearing your views.

18 MR. WITTMANN: Nothing from the defendants,  
19 Your Honor.

20 MR. SEEGER: Nothing further from plaintiffs,  
21 Your Honor.

22 MS. BARRIOS: Nothing further.

23 MR. BECNEL: Judge, I have a lawyer who has referred  
24 me 160 cases from Oregon. I have dealt with Mr. Wittmann's  
25 associate, Ms. Wimberly. He wants to bring them all here, but



1 because of the peculiar law in Oregon he is starting to have to  
2 file them right away in Oregon. I'm trying to get some sort of  
3 a deal with the defendants to get them all here without missing  
4 a statute problem. I'm just wondering how we can work that  
5 out.

6 MR. WITTMANN: We are working that out now, actually,  
7 Your Honor, with a procedure for the filing of a master  
8 complaint in the MDL that will permit people to come in and tag  
9 along and sign on with the short form joinder pleading, which  
10 should take care of Mr. Becnel's problem.

11 THE COURT: Mr. Seeger, get with Mr. Becnel and see  
12 if we can handle this particular problem.

13 MR. SEEGER: Yes, Your Honor.

14 MR. GIRARDI: Tom Girardi, Your Honor.

15 THE COURT: Mr. Girardi.

16 MR. GIRARDI: Your Honor, we now have a state court  
17 judge for the 2,000 cases in California. I will provide you  
18 with that contact information, Judge Chaney.

19 THE COURT: Please do that because I am trying to  
20 keep in touch with the state court judges. When we begin  
21 setting some Daubert hearings or other hearings, if they wish  
22 to come in the case, we will do either the voice or do video  
23 streaming so that they can participate and deal with it  
24 according to their law, but they won't have to retake the  
25 witnesses. If they have any questions, they can ask the

1 questions while the witnesses are there, so I would like to  
2 know that. Thank you.

3 MR. SEEGER: Just for the record, if I could ask  
4 Mr. Girardi to copy liaison counsel on that?

5 MR. GIRARDI: Yes.

6 THE COURT: Anything else? The next status  
7 conference is Tuesday, July 19, 9:30. I'll meet with the  
8 liaison counsel in my chambers at 8:00 that day to begin  
9 getting ready for this meeting. I appreciate everybody's  
10 cooperation and for their reports. Thank you. Court will  
11 stand in recess.

12 THE DEPUTY CLERK: Everyone rise.

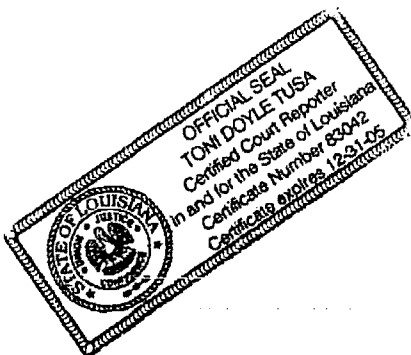
13 (WHEREUPON, the Court was in recess.)

14 \* \* \*

15 CERTIFICATE

16 I, Toni Doyle Tusa, CCR, Official Court Reporter,  
17 United States District Court, Eastern District of Louisiana, do  
18 hereby certify that the foregoing is a true and correct  
19 transcript, to the best of my ability and understanding, from  
20 the record of the proceedings in the above-entitled and  
21 numbered matter.

22 Toni Doyle Tusa  
23 Toni Doyle Tusa, CCR  
24 Official Court Reporter  
25



## Exhibit C

FILED  
MISSOULA, MT  
2006 MAY 12 AM 8 04  
PATRICK E. DUFFY  
BY \_\_\_\_\_  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

THE STATE OF MONTANA,	)	CV-06-07-H-DWM
ex rel MIKE McGRATH,	)	
Attorney General,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
MERCK & CO., INC.,	)	
	)	
Defendant.	)	
_____	)	

This case presents jurisdictional and procedural questions for the Court. The State of Montana filed a motion to remand this case back to state district court. In turn, Merck filed a motion to stay all proceedings pending a transfer decision by the Judicial Panel on Multidistrict Litigation. Finally, the State has requested expedited consideration of its motion to remand. Experience and case law support deference to the Judicial Panel.


While the case may address state law and this Court may have the liberty to rule on the motion to remand before a decision by the Judicial Panel, the Court must consider the staggering number

of cases involving Merck that are now before the United States District Court for the Eastern District of Louisiana as part of MDL Proceeding No. 1657. See *In re Vioxx Prods. Liability Litigation*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (the Judicial Panel consolidated 148 actions in 48 federal districts to the transferee court where the judge has experience in complex multidistrict liability litigation). Judicial economy dictates this Court follow suit. Any prejudice suffered by the State of Montana as a result of a stay will be minimal. See *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358 (C.D. Cal. 1997). Notably, the Judicial Panel stated "[t]he pendency of a motion to remand to state court is not a sufficient basis to avoid inclusion." *In re Vioxx Prods. Liability Litigation*, 360 F. Supp. 2d at 1354. This Court will stay the motion to remand pending a "tag-along" determination by the Judicial Panel.

Accordingly, IT IS HEREBY ORDERED that Defendant's motion to stay proceedings (dkt #5) is GRANTED pending a determination by the Judicial Panel on Multidistrict Litigation; and

IT IS FURTHER ORDERED that Plaintiff's motion to expedite (dkt #9) is DENIED.

DATED this 11<sup>th</sup> day of May, 2006.

  
\_\_\_\_\_  
Donald W. Molloy, Chief Judge  
United States District Court

-2-

## Exhibit D

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,

Plaintiff,

vs.

MERCK & CO., INC.,

Defendant.

Case No. 3:06-cv-0018-TMB

ORDER

BACKGROUND

The State of Alaska (“the State”) filed this case on December 23, 2005, in Superior Court. The State’s complaint alleges that Merck’s marketing practices for the drug Vioxx violated Alaska’s Unfair Trade Practices and Consumer Protection Act. The complaint also alleges that Merck made false statements concerning the safety of Vioxx “that induced the State of Alaska to authorize expenditure of Medicaid funds for the purchase of Vioxx.” Docket No. 1, Ex. 3 (Compl. ¶ 22). Merck removed the case to federal court, arguing that the case raises a substantial federal question. Docket No. 1. Merck then moved to stay all proceedings pending transfer to the Judicial Panel on Multidistrict litigation (“MDL”). Docket Nos. 8 (Mot.); 14 (Opp’n); 15 (Reply). Subsequently, the State moved for remand back to state court. Docket Nos. 13 (Mot.); 19 (Opp’n); 24 (Reply). On February 7, 2006, the MDL Panel issued a conditional transfer of the case. Docket No. 17, Ex. A. The conditional transfer order states that this action appears to involve “questions of fact which are common to the actions previously transferred” to the MDL Panel. *Id.* The MDL Panel issued a schedule requiring the State to oppose the transfer by March 9, 2006. *Id.* The State has moved for expedited consideration of its motion to remand, requesting that the Court issue a

ruling before the State's opposition to the MDL transfer is due. Docket No. 25. The motion for expedited consideration at **Docket No. 25** is **GRANTED**.

### DISCUSSION

Courts must strictly construe the removal statute, 28 U.S.C. § 1441, against removal jurisdiction. Federal jurisdiction "must be rejected if there is any doubt as to the right of removal in the first instance." *Duncan v. Sutezle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). As is pertinent here, 28 U.S.C. § 1441 provides for the removal of (1) actions arising under federal law or (2) actions between parties of diverse citizenship where none of the defendants are citizens of the forum state. *See* 28 U.S.C. § 1441(b).<sup>1</sup> The Court must examine the complaint filed in state court to determine whether it states a claim arising under federal law. In making this determination, it is irrelevant whether the defendant intends to rely on the United States Constitution or a federal statute in defending the action. The inquiry is limited to the grounds for relief invoked by the plaintiff in its complaint. *See Merrell-Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

On February 16, 2005, the MDL Panel issued the first transfer order establishing MDL-1657, *In re Vioxx Marketing, Sales Practices and Products Liability Litigation*, pursuant to 28 U.S.C. § 1407. In that order the Panel stated, "[t]he pendency of a motion to remand to state court is not a sufficient basis to avoid inclusion in Section 1407 proceedings." 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005). The pendency of transfer to MDL, however, does not limit the Court's authority to rule on the motion for remand. Several courts have opted to rule on motions for

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<sup>1</sup> The statute provides:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b).

### ORDER



remand despite the pendency of transfer to MDL-1657. *See, e.g., Kantner v. Merck & Co.*, 2005 WL 277688 (S.D. Ind. Jan 26, 2005). However, 3,008 actions have been transferred to MDL-1657. Docket No. 17, Ex. A.

A preliminary review of the complaint and motion to remand reveals the difficult issue of whether federal question jurisdiction exists based on federal Medicaid law, which limits a state's authority to decline to pay for prescription drugs covered under the program. *See* 42 U.S.C. §§ 1396r-8(d)(4). As this case does not plainly warrant immediate remand, the Court finds that transfer to the MDL panel will promote efficient and coordinated proceedings, including the consideration of remand motions.<sup>2</sup> The State will suffer minimal prejudice from the stay. By contrast, the risk to Merck of duplicative litigation is significant.

**IT IS THEREFORE ORDERED:**

The motion to stay proceedings pending transfer to the MDL panel at **Docket No. 8** is **GRANTED**. This case will be transferred to MDL-1657 for a consolidated determination of jurisdictional issues.

Dated at Anchorage, Alaska, this 6th day of March 2006.

\_\_\_\_\_  
/s/ TIMOTHY M. BURGESS

**TIMOTHY M. BURGESS**  
United States District Judge

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<sup>2</sup> The judge presiding over the Vioxx MDL proceeding has expressed his preference that remand motions be presented to the MDL Panel: "There are various issues of remand in various cases throughout the country. Again, a significant advantage of the MDL concept is some consistency. . . I'm conscious of dealing with the remand [motions] as quickly as possible, but I do want to get them all together . . . and deal with that issue in a consistent and fair fashion." Docket No. 19, Ex. 1 (Transcript of Status Conference at 21, MDL No. 1657 (June 23, 2005)).

ORDER

## Exhibit E

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

-----X  
**EVERARDO S. AGUILAR,**

**Plaintiff,**

**MEMORANDUM AND ORDER**

**-against-**

**05-CV-4865 (SJ)**

**MERCK & CO., INC., et al.,**

**Defendants.**  
-----X

**ROANNE L. MANN, UNITED STATES MAGISTRATE JUDGE:**

Currently pending before this Court is an application by defendant Merck & Co., Inc. ("defendant" or "Merck") to stay this action pending a decision by the Judicial Panel on Multidistrict Litigation ("the MDL Panel") whether to transfer the case as a "tag-along" action to In re VIOXX Products Liability Litigation, MDL No. 1657, an MDL action pending in the Eastern District of Louisiana. Plaintiff Everardo S. Aguilar ("plaintiff" or "Aguilar") has consented to stay discovery only, has cross-moved to remand the case to state court and opposes any stay of that motion.

For the reasons that follow, defendant's motion to stay this action is granted in its entirety, and the motion to remand is deferred until the issue of transfer is resolved by the MDL Panel.

**BACKGROUND**

On September 21, 2005, plaintiff commenced this action in New York State Supreme Court, Queens County, against Merck (the manufacturer of the prescription drug Vioxx) and a series of medical providers who are alleged to have improperly prescribed Vioxx to plaintiff. Merck removed the action to this Court on October 17, 2005, on the basis of diversity

jurisdiction, contending that the non-diverse medical providers were fraudulently joined in order to defeat diversity jurisdiction.

On October 31, 2005, Merck moved to stay all further proceedings in this district pending a decision by the MDL Panel on whether the case should be transferred to the MDL Court in the Eastern District of Louisiana pursuant to 28 U.S.C. § 1407.<sup>1</sup> On November 7, 2005, the MDL Panel issued its thirtieth conditional transfer order of tag-along cases, which, absent an objection within 15 days, would transfer this case and others to the MDL Court. See 11/15/05 Letter to the Court from Vilia B. Hayes and Conditional Transfer Order (CTO-30), appended thereto.<sup>2</sup> That same day, plaintiff moved in this district to remand the instant action to state court. See Memorandum of Law in Support of Plaintiff's Motion for an Order Remanding this Matter to State Court ("Pl. Mem."). Plaintiff resists having the remand motion deferred until after the MDL Panel has transferred the case. See id. at 5-7; Plaintiff's Partial Opposition to Merck's Motion for Stay.

### **DISCUSSION**

As plaintiff correctly contends (see Pl. Mem. at 5), the pendency of a request to transfer a case to an MDL proceeding does not divest the transferor court of the authority to resolve a motion to remand the case to state court. See, e.g., JPML R. 1.5; Evans v. Merck & Co., Inc.,

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<sup>1</sup> The MDL Panel established the MDL proceeding on February 16, 2005. See In re VIOXX Prods. Liab. Litig. (MDL 1657), 360 F.Supp.2d 1352 (J.P.M.L. Feb. 16, 2005). To date, more than 2,500 cases have been transferred to or filed directly in the MDL proceedings. See Memorandum of Law in Support of Motion of Defendant Merck & Co., Inc. to Stay All Proceedings Pending a Decision on Transfer by the Judicial Panel on Multidistrict Litigation at 3.

<sup>2</sup> This Court has no information as to whether plaintiff has filed with the MDL Panel an objection to transfer.

No. 05-1323-T/AN, 2005 WL 3008643, at \*1 (W.D. Tenn. Nov. 9, 2005). Even after the MDL Panel has issued a conditional transfer order, the transferor court retains the discretion to grant or deny a motion to stay consideration of a jurisdictional challenge. See id.; North v. Merck & Co., Inc., No. 05-CV-6475L, 2005 WL 2921638, at \*1 (W.D.N.Y. Nov. 4, 2005). The jurisdiction of the transferor court does not end until the order of the MDL Panel transferring the case has been filed with the MDL Court. See David F. Herr, Annotated Manual for Complex Litigation § 20.131 (4th ed. 2004) (hereinafter “Manual for Complex Litigation”).

In connection with the Vioxx litigation, the MDL Panel has expressly observed that “[t]he pendency of a motion to remand to state court is not a sufficient basis to avoid inclusion in Section 1407 proceedings.” In re VIOXX Prods. Liab. Litig., 360 F.Supp.2d 1352, 1354 (J.P.M.L. Feb. 16, 2005). Indeed, in establishing the Vioxx MDL, the Panel transferred to the MDL Court two actions with pending motions to remand to state court. See id. at 1353-54. According to the MDL Panel, the motions to remand in those two cases, “as well as in any other MDL-1657 actions[,] can be presented to and decided by the transferee judge.” Id. at 1354 (citing In re Ivy, 901 F.2d 7 (2d Cir. 1990)).

The Panel’s decision is consistent with the law in the Second Circuit, where the “preferable practice” in MDL litigation is to allow the transferee court to resolve jurisdictional issues that implicate common questions of law and fact arising in numerous cases. Medical Soc’y v. Conn. Gen. Corp., 187 F.Supp.2d 89, 91 (S.D.N.Y. 2001) (citing Ivy, 901 F.2d 7); see, e.g., North, 2005 WL 2921638, at \*1 (noting, in Vioxx case, that the Second Circuit has adopted the “general rule” of deferring decisions on remand motions until after the MDL Panel has transferred the case); DeBono v. American Home Prods. Corp., No. 04 Civ. 3810(DC), 2005 WL

2601177, at \*1 (S.D.N.Y. Nov. 16, 2004) (“[T]he Second Circuit has observed that an MDL Court is often best suited to resolve remand motions, especially when the issues involved are likely to recur.”). As the Second Circuit observed in Ivy, where the jurisdictional issue “is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation,” and “involves common questions of law and fact,” “[c]onsistency as well as economy is . . . served” by having the jurisdictional objections “heard and resolved by a single court . . .” Ivy, 901 F.2d at 9; see Manual for Complex Litigation § 20.131 (“[T]he pendency of motions raising questions common to related actions can itself be an additional justification for transfer.”).

The aforesaid general rule should be followed in the instant case. Merck has challenged the joinder of doctors and/or pharmacies in other Vioxx cases in this circuit, and the plaintiffs’ motions to remand have been deferred until after transfer to the MDL litigation, on the ground that “the issues raised in plaintiff’s remand motion are not unique to this case.” North, 2005 WL 2921638, at \*2; Krieger v. Merck & Co., Inc., No. 05-CV-6338L, 2005 WL 2921640, at \*2 (W.D.N.Y. Nov. 4, 2005); see also Evans, 2005 WL 3008643, at \*1 (“[T]he jurisdictional issues raised in this case are similar to those raised in other [Vioxx] cases that have been or will be transferred to the MDL proceeding.”); Walker v. Merck & Co., Inc., No. 05-CV-360-DRH, 2005 WL 1565839, at \* 2 (S.D. Ill. June 22, 2005) (“[I]t is almost certain that the transferee court will hear and decide many of the same issues Plaintiffs ask this Court to tackle in ruling on their motion to remand.”). To be sure, a number of Vioxx decisions from outside this circuit have

resolved remand motions prior to the MDL Panel's decision on transfer.<sup>3</sup> Nevertheless, "there are many more that have chosen to grant a stay," Evans, 2005 WL 3008643, at \*1 (collecting cases), including the two decisions from within this circuit. North, 2005 WL 2921638; Krieger, 2005 WL 2921640, at \*2 (granting stay and noting that courts around the country have stayed Vioxx cases "pending their transfer to the MDL, including more than 125 with pending remand motions."); see, e.g., West v. Merck & Co., Inc., No. 05-1166-T/AN, 2005 WL 1630034 (W.D. Tenn. July 7, 2005); Walker, 2005 WL 1564839. Moreover, at a proceeding in the Vioxx MDL litigation, Judge Eldon B. Fallon, the district judge presiding over the MDL proceeding, expressly acknowledged the advantages of having a single judge decide the many motions to remand, and he assured the parties that he would deal with the motions "as quickly as possible . . ." Transcript of 6/23/05 Status Conference in In re VIOXX Prods. Liab. Litig., at 21 (appended as Exhibit A to the Declaration of Vilia B. Hayes dated 11/22/05 ["Hayes Decl"]).

Having considered these decisions and the parties' arguments, this Court concludes "that having the jurisdictional issues decided in one proceeding will promote judicial economy and conserve judicial resources," Evans, 2005 WL 3008643, at \*2, and will minimize "the risk of inconsistent rulings . . . ." North, 2005 WL 2921638, at \*2 n.2 (quoting Purcell v. Merck & Co., No. 05 CV 0443-L(BLM), slip. op. at 4-5 (S.D. Cal. June 6, 2005) (Hayes Decl. Ex. B)); see North, 2005 WL 2921638, at \*2 ("I agree with Merck that the objectives of the MDL process—namely the avoidance of inconsistent rulings and the conservation of judicial resources—are best

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<sup>3</sup> See, e.g., Plubell v. Merck & Co., Inc., No. 05-0831-CV-W-HFS, 2005 WL 2739036 (W.D. Mo. Oct. 20, 2005); Rabe v. Merck & Co., Inc., Nos. Civ. 05-363-GPM, 05-378-GPM, 2005 WL 2094741 (S.D. Ill. Aug. 25, 2005); Kantner v. Merck & Co., Inc., No. 1:04CV2044-JDT-TAB, 2005 WL 277688, at \*3 (S.D. Ind. Jan. 26, 2005).

met by allowing the MDL Court to decide plaintiff's motion to remand."'). "[A]ny prejudice to the plaintiff resulting from a stay would be minimal," Evans, 2005 WL 3008643, at \*2, and "does not outweigh the judicial economy interests" served by granting a stay. Walker, 2005 WL 1565839, at \*2; see North, 2005 WL 2921638, at \*2; Krieger, 2005 WL 2921640, at \*2. Therefore, Merck's motion for a stay is granted in its entirety.

### **CONCLUSION**

For the foregoing reasons, Merck's motion to stay this proceeding pending the MDL Panel's decision on transfer is granted and plaintiff's cross-motion to remand is deferred until the issue of transfer has been resolved.

**SO ORDERED.**

**Dated: Brooklyn, New York  
November 22, 2005**

**ROANNE L. MANN  
UNITED STATES MAGISTRATE JUDGE**